Filed 9/22/06 In re Joshua P. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re JOSHUA P., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY DEPARTMENT OF CHILDREN'S SERVICES, Plaintiff and Appellant, v. VANESSA P., Defendant and Respondent.	E039831 (Super.Ct.No. J-203499) OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge. Reversed.

Dennis E. Wagner, Interim County Counsel, and Jacqueline Carey-Wilson, Deputy County Counsel, for Plaintiff and Appellant.

William Hook, under appointment by the Court of Appeal, for Defendant and Respondent.

Robert Wayne Gehring, under appointment by the Court of Appeal, for Minor.

1. Introduction[1]

The Department of Children's Services (DCS) appeals from a dispositional order of the dependency court granting reunification services until April 2006 to Vanessa P., mother of Joshua P.[2] (§ 395.) DCS contends the order was an abuse of discretion. We agree and reverse the judgment.

2. Factual and Procedural Background

Joshua was born in September 2004. Dependency proceedings commenced in August 2005. The original petition alleged parents' failure to protect Joshua due to substance abuse, domestic violence, and neglect, and no provision for support. (§ 300, subds. (b) and (g).) Mother was arrested and incarcerated for methamphetamine possession and use. The whereabouts of Joshua D., father, were unknown. Additionally, Joshua's older siblings had been removed and parents had failed to reunify with them. (§ 300, subd. (j).)

According to DCS reports, the parents' history with the dependency system began in 1998. Their three daughters were born in 1998, 1999, and 2000. The first child was removed in July 1998. The other two were relinquished by parents or removed by DCS at birth. Mother twice failed to comply with the drug program ordered by the court in the 1998 dependency proceeding. Mother used methamphetamine during her second

[1] All statutory references are to the Welfare and Institutions Code.

pregnancy. The third child tested positive at birth. She was born blind and deaf with a brain lesion/infraction and developmental delays that could have occurred because of mother's use of drugs. Parents did not unify with the children, all of whom have now been adopted.

Both parents have struggled with methamphetamine addiction. Between 1998 and 2005, mother had a criminal record of child abandonment, battery, public intoxication, annoying phone calls, and being under the influence of a controlled substance. Between 1994 and 2002, father had a criminal record of burglary, forgery, receiving stolen property, public intoxication, possession for sale and being under the influence of a controlled substance.

In August 2005, Joshua P. was taken into custody by DCS when he was 11 months old. Mother was arrested for possession and use of methamphetamine and on an outstanding warrant. Joshua was severely developmentally delayed by several months. He was not walking, pulling himself up, or crawling. He was dirty and weighed only 15 pounds, placing him in the lowest 5 percent for weight for his age. His motor skills were poor.

DCS recommended the court find that no reunification services should apply pursuant to section 361.5, subdivisions (b) and (e). Mother admitted having used methamphetamine three days before the detention hearing. Mother claimed she had

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[footnote continued from previous page]

2 We speculate this issue may actually be moot since it is many months past April 2006, the last date on which mother was to receive reunification services.

Native American heritage, either Crow, Cherokee, or Ute. The court adopted the findings of DCS, determined there was a prima facie case for detention, and removed Joshua from the parents.

Although mother denied using drugs during her pregnancy, she had tested positive for marijuana when Joshua was born. Mother was erratic about keeping the baby's medical appointments and dismissive about the doctor's concern about him being underweight. Neither parent has finished high school and both have continued to use drugs and neglect their children for almost 10 years.

DCS recommended Joshua not be returned to his parents. No relative placement was suitable. The proposed concurrent plan was for adoption.

As of October 2005, mother was on the waiting list for a drug treatment program. Mother was not participating in parenting classes or communicating well with the social worker about her plan. Mother's visitation with Joshua had not been successful. She arrived late with unauthorized people accompanying her. She spoke roughly and inappropriately to Joshua and let him fall, bumping his head. She became angry and threatened the social worker. She was unavailable for scheduling subsequent visits. Mother had not submitted to a drug test.

The court made the appropriate jurisdictional findings in November 2005.

In December 2005, DCS reported mother had admitted she was still using drugs and she was not complying with her drug treatment plan. She also had arrived an hour late for a scheduled visit with Joshua. She did not comply with a request for drug testing. She had moved out of the sober-living facility. She was not participating satisfactorily

with the drug treatment program. She had one negative drug test on November 8 but otherwise she was not submitting to random drug testing. None of the Indian tribes to whom DCS gave notice had asserted an interest in Joshua.

At the contested dispositional hearing, mother testified she had been a drug addict since she was nine years old and that she continued to use drugs intermittently through November 2005. After testing positive on November 29, she had been drug-free for only six days. Mother declined to participate in an inpatient treatment program.

The court acknowledged mother's prognosis was "lousy I think by anybody's estimation. What's happened in the past, her track record is probably the best predictor of what's going to happen in the future. I would probably be fully justified in following the recommendations of the Department in this case but I'm not going to do that. I'm going to give the mother an opportunity in this case to prove all the experts wrong. . . . [¶] . . . [¶] [W]hat really differentiates this case is what happened to her in the past and maybe she'll be able to learn from that."

The court then ordered that reunification services be provided to mother until the six-month hearing on April 21, 2006, with supervised visits once a week.

3. Discussion

On appeal, we review an order granting reunification services for an abuse of discretion. (*In re N.M.* (2003) 108 Cal.App.4th 845, 852; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) Even if we were to conduct a de novo review, as argued by DCS, we would reach the same conclusion.

If a parent has previously failed to reunify with a child's sibling, has previously

had parental rights terminated, or has chronic, ongoing problems with substance abuse, she may be denied reunification services. Section 361.5, subdivision (b), provides:

"Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence . . . . [¶] . . . [¶]

"(10) That the court ordered termination of reunification services for any siblings or half-siblings of the child because the parent or guardian failed to reunify with the sibling or half-sibling after the sibling or half-sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half-sibling of that child from that parent or guardian.

"(11) That the parental rights of a parent over any sibling or half-sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half-sibling of that child from the parent. [¶] . . . [¶]

"(13) That the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and . . . has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible."

Section 361.5 has been explained in detail in *Renee J. v. Superior Court* (2001) 26

Cal.4th 735, 744-745, citing *In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478: "'As a general rule, reunification services are offered to parents whose children are removed from their custody in an effort to eliminate the conditions leading to loss of custody and facilitate reunification of parent and child. This furthers the goal of preservation of family, whenever possible. [Citation.] Nevertheless, as evidenced by section 361.5, subdivision (b), the Legislature recognizes that it may be fruitless to provide reunification services under certain circumstances. [Citation.] Once it is determined one of the situations outlined in subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources. [Citation.]'

"As pertinent, the *In re Baby Boy H.* court went on to infer that the Legislature intended to restrict provision of reunification services in the case of a parent who previously had failed to reunify. 'The exception at issue here, section 361.5, subdivision (b)(10), recognizes the problem of recidivism by the parent despite reunification efforts. Before this subdivision applies, the parent must have had at least one chance to reunify with a different child through the aid of governmental resources and fail to do so. Experience has shown that with certain parents, as is the case here, the risk of recidivism is a very real concern. Therefore, when another child of that same parent is adjudged a dependent child, it is not unreasonable to assume reunification efforts will be unsuccessful. Further, the court may still order reunification services be provided if the court finds, by clear and convincing evidence, that reunification is in the best interests of the child. (§ 361.5, subd. (c).)' [Citation.]

"We agree with *In re Baby Boy H.*'s understanding of the legislative purpose in enacting section 361.5, subdivision (b)(10) and with its interpretation of the statute. . . . At the same time that it enacted subdivision (b)(10) . . . the Legislature shortened from 12 months to six the period for provision of reunification services in the case of a child who was under age three at the time of removal from the physical custody of the parent. (§ 361.5, subd. (a)(2), added by Stats. 1996, ch. 1083, § 2.7.) One might thus characterize both of these amendments as aimed at expediting the dependency process in order to facilitate the placement of minors in stable, permanent homes, particularly in the cases of the youngest children and those least likely to benefit from reunification services."

Clear and convincing evidence in the record supports the exception announced in section 361.5, subd. (b). The court ordered termination of reunification services for Joshua's three siblings because mother failed to reunify with them. Mother has not made a reasonable effort to treat the problems that led to the removal of the siblings. (§ 361.5, subd. (b)(10).) Parental rights were also terminated due to mother's failure to make reasonable remedial efforts. (§ 361.5, subd. (b)(11).) Finally, there is clear and convincing evidence that mother has a history of extensive, abusive, and chronic drug use and has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible.

Nevertheless, in spite of the foregoing, the court ordered that reunification services should be provided without making any finding, by clear and convincing evidence, that reunification was in the best interests of the child. Instead, the court expressed serious

doubts about whether mother could make any progress toward reunification. To the contrary, the court deemed the situation to be nearly hopeless but expressed an unfounded view that mother might learn from her past mistakes and accomplish the recovery that had eluded her. But the court did not articulate any reason why it would be in Joshua's best interest to attempt a pointless effort at reunification while delaying longer the permanent disposition.

Based on this record, in which there is a paucity of evidence to support any finding that reunification would be in Joshua's best interest, mother's history and conduct unquestionably gave the trial court reason to deny reunification services. Her failure to reunify and the termination of her parental rights in three instances, combined with her chronic drug use, meant it was an abuse of discretion to order reunification services with Joshua. (§ 361.5, subd. (b)(10), (11), and (13).)

4. Disposition

We reverse the order of the juvenile court granting mother reunification services until April 2006.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/Hollenhorst
J.